

**INDIANA COURT OF APPEALS
ORAL ARGUMENT AT A GLANCE
SAINT MARY-OF-THE-WOODS COLLEGE**

CRIMINAL LAW

Did Captain Holmes' entry into Mr. Sapen's residence and use of force contravene the Fourth Amendment to the U.S. Constitution and Article I, Section 11 of the Indiana Constitution?

*Charles
E.
Sapen v.
State of
Indiana*

**Appeal
from:
Elkhart
Superior Court**

**The Honorable
David C.
Bonfiglio,
Judge**

**Oral
Argument:
April 12, 2007
10:00 a.m. –
11:00 a.m.
30 minutes
each side**

CASE SYNOPSIS

**Facts and Procedural
History**

During the early morning hours of October 24, 2004, Elkhart County Sheriff Captain Sean Holmes was patrolling for impaired drivers on county roads. At the intersection of county roads 109 and 102, Captain Holmes observed an SUV go beyond a stop sign and stop in the roadway. Captain Holmes turned around, activated his overhead light and followed the SUV. Approximately forty-five seconds later, Captain Holmes pulled into a residence driveway behind Sapen, the driver of the SUV. Sapen got out of his vehicle, and walked back to Captain Holmes. Captain Holmes asked if Sapen had seen his lights and Sapen replied in the negative. Captain Holmes instantly detected a smell of alcohol, and observed that Sapen had "red, glassy" eyes. In Captain Holmes' opinion, Sapen "concentrated on walking." Sapen gave Captain Holmes his driver's license and indicated that he needed to get his vehicle registra-

tion.

Captain Holmes walked back to his vehicle to notify dispatch of his location, and soon noticed that Sapen was gone. Captain Holmes called out to Sapen, and then entered Sapen's garage and opened the door to the garage office. Sapen was inside, and refused Captain Holmes' entreaties to come outside and perform field sobriety tests. Sapen repeatedly indicated that he was in his own home. He also reached into desk drawers, stating that he needed to contact his attorney. Inside the garage office, Captain Holmes observed that Sapen smelled of alcohol, "concentrated on standing" and had a "little sway" in his movements. Captain Holmes grabbed Sapen's hand, and Sapen pushed back and pulled away. Captain Holmes threatened to use pepper spray to compel Sapen out of the garage office. Sapen continued to rummage in a desk drawer and Captain Holmes administered two bursts of pepper spray. Captain Holmes insisted that Sapen "come out in fresh air," but Sapen rummaged in a desk drawer again. Captain Holmes got one handcuff on Sapen, who pulled away. Captain Holmes then "used

*Charles E. Saper v. State of Indiana***Case Synopsis (continued)**

the handcuff to bring Saper to the ground.” During the arrest, Captain Holmes sustained a knuckle injury and a cut on his arm that caused “discomfort and swelling.” Saper refused a portable breath test and chemical blood alcohol test.

Saper was charged with Operating While Intoxicated, as a Class A misdemeanor, Ind. Code § 9-30-5-2, and Resisting Law Enforcement, as a Class D felony, Ind. Code § 35-44-3-3(a). On November 5, 2005, Saper filed a motion to suppress all evidence garnered as a result of Captain Holmes’ entry into his home. After a hearing, the motion was denied. Saper was brought to trial on May 8, 2006. Over Saper’s objection, the trial court instructed the jury that Captain Holmes’ residential entry was lawful under the United States Constitution and the Indiana Constitution. On May 9, 2006, Saper was convicted as charged. On July 12, 2006, the trial court sentenced Saper to eighteen months imprisonment, with all but 90 days suspended to probation.

Parties’ Arguments

Saper contends that Captain Holmes’ entry into his residence and use of excessive force contravened the Fourth Amendment to the U.S. Constitution and Article I, Section 11 of the Indiana Constitution. The State responds that Captain Holmes was in “hot pursuit” of Saper, a fleeing suspect, and that exigent circumstances existed (specifically, the continuing dissipation of alcohol detectable in Saper’s breath). Saper challenges the ex-

istence of “hot pursuit,” contending that Captain Holmes had only observed the commission of a traffic infraction and had not ordered Saper to stop before he entered his garage.

Under the Fourth Amendment, when probable cause exists for a warrantless search, and there are exigent circumstances, an officer may enter a defendant’s home. Johnson v. State, 747 N.E.2d 623, 631 (Ind. Ct. App. 2001) (citing Payton v. New York, 445 U.S. 573, 576 (1980)). Exigent circumstances permitting a warrantless intrusion in accordance with the Indiana Constitution include: (1) risk of bodily harm or death; (2) need to aid a person in need of assistance; (3) need to protect private property; and (4) actual or imminent destruction or removal of evidence before a search warrant may be obtained. Willis v. State, 780 N.E.2d 423, 428 (Ind. Ct. App. 2002). “Hot pursuit” and the mobility of a vehicle have also been recognized as presenting exigent circumstances. See id. In reaching its conclusion that Captain Holmes’ entry was lawful, the trial court relied upon the case of State v. Straub, 749 N.E.2d 593 (Ind. Ct. App. 2001).

See page 3 for the text of the 4th Amendment of the U.S. Constitution and Article I, Section 11 of the Indiana Constitution.

The Straub Court found that the State had met its burden to demonstrate exigent circumstances to overcome the presumption of unreasonableness that accompanies warrantless home entries. See id. at 598. The “exigent circumstance” was the need to preserve evi-

Case Synopsis (*continued*)

dence of Straub's blood alcohol content. *Id.* at 600.

With respect to the reasonableness of the intrusion under the Indiana Constitution, the State and Saper agree that *Litchfield v. State*, 824 N.E.2d 356 (Ind. 2005) sets forth the appropriate standard for review. The reviewing Court is required to assess the reasonableness of the officer's actions given the totality of the circumstances that exist. *Id.* at 359. Although there may be other relevant considerations, reasonableness turns upon a balance of: (1) the degree of concern, suspicion or knowledge that a violation has occurred; (2) the degree of intrusiveness that the method of the search or seizure imposes on the citizen's ordinary activities; and (3) the extent of law enforcement needs. *Id.* at 361.

Although the common law rule that allowed a person to resist an unlawful arrest with reasonable force has been abrogated in favor of a legal remedy through civil actions, "[w]e have not ... interpreted this rule as a blanket prohibition that criminalizes any conduct evincing resistance where the means used to affect an arrest are unlawful." *Alspach v. State*, 755 N.E.2d 209, 211 (Ind. Ct. App. 2001), *trans. denied*. We have recognized that a greater privilege exists to resist an unlawful entry into private premises than to

resist an unlawful arrest in a public place. *Adkisson v. State*, 728 N.E.2d 175, 179 (Ind. Ct. App. 2000) (citing *Casselmann v. State*, 472 N.E.2d 1310, 1315-16 (Ind. Ct. App. 1985)). The *Adkisson* Court reversed a conviction for resisting law enforcement where the officer announced that defendant was under arrest for a misdemeanor after the officer entered defendant's house; the officer had made an illegal entry and thus was not lawfully engaged in the execution of his duties when the defendant resisted arrest. See also *Shoultz v. State*, 735 N.E.2d 818, 822 (Ind. Ct. App. 2000) (reversing conviction for resisting law enforcement when arresting officer used excessive force), *trans. denied*.

GLOSSARY

U.S. Constitution, Fourth Amendment

This protects "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"

Indiana Constitution, Article I, Section 11

Although its text is virtually identical to the Fourth Amendment to the U. S. Constitution, Indiana courts interpret this provision to provide some protections in addition to those of the Fourth Amendment. For example, the Indiana Constitution affords greater protections from police trash and car searches than does the Fourth Amendment.

Opinion in this case expected:

By summer 2007

The Court will notify Professor Myers when the opinion is handed down. Please check the Court's website to read the opinion.

Court of Appeals opinions are available online at <http://www.in.gov/judiciary/opinions/appeals.html>.

Locate archived opinions at <http://www.in.gov/judiciary/opinions/archapp.html>

TODAY'S PANEL OF JUDGES

Hon. John G. Baker (Monroe County), Presiding

- Judge of the Court of Appeals since June 1989
- Chief Judge of the Court since March 2007

John G. Baker is originally from Aurora in Dearborn County and lived in Monroe County for 35 years. Since June 1989, he has served as a Judge of the Indiana Court of Appeals representing the First District and has authored more than 3,000 majority opinions. Prior to becoming an appellate court judge, he served as county court and superior court judge for 13½ years in Bloomington, disposing of more than 15,000 cases.

Judge Baker graduated from Culver Military Academy and received his A.B. degree from Indiana University in 1968 in History and his J.D. from the Indiana University School of Law —Bloomington in 1971. He received his LLM in Judicial Process from the University of Virginia in 1995. Before assuming the trial bench, he was a partner in the firm of Baker, Barnhart and Andrews in Bloomington and was a Captain in the U.S. Army Reserves.

Since 1980, Judge Baker has taught as an adjunct professor at Indiana University's School of Public and Environmental Affairs, and since 2004 at the School of Law in Bloomington. In addition, Judge Baker has served on the faculties of the Indiana Judicial College, Indiana Continuing Legal Education Forum, and the National Institute of Trial Advocacy.

His professional associations include the American, Indiana State, Monroe County and Indianapolis Bar Associations. For the latter, he served as Vice-President in 1995. He has been a member of the Indiana Judges Association's Board of Managers continually since 1979 and served as its President from January of 1987 through June of 1989.

Judge Baker has been active in community and civic affairs as well. In addition to his church, YMCA, and other similar organizations, Judge Baker has been active in Boy Scouts of America since his youth and was awarded the rank of Eagle Scout.

Judge Baker was retained on the Court by election in 1992 and 2002. He and his wife have five children and – so far – four grandchildren.

The Court of Appeals hears oral argument at venues across the state to enable Hoosiers to learn about the judicial branch.

This initiative was instituted statewide just prior to the Court's centennial in 2001.

Today's oral argument is the 183rd case the Court of Appeals has heard "on the road" since early 2000.

It is also the 25th straight year the Court has heard oral argument at Saint Mary-of-the-Woods.

Among the sites for traveling oral arguments are law schools, colleges, high schools, and county courthouses.

TODAY'S PANEL OF JUDGES

Hon. Edward W. Najam, Jr. (Monroe County)

- Judge of the Court of Appeals since December 1992

Edward W. Najam, Jr. graduated from the Indiana University High School in Bloomington, where he grew up, and attended Indiana University at Bloomington. At I.U. he earned a B.A. in political science, with highest distinction, in 1969, was elected to Phi Beta Kappa, and was elected Student Body President. Judge Najam earned his J.D. from Harvard Law School in 1972.

After admission to the Bar, he was Administrative Assistant to the Mayor of Bloomington for two years and an attorney in private practice for eighteen years. He served as a member of the Civil Justice Reform Act Advisory Group and the Local Rules Advisory Committee of the United States District Court for the Southern District of Indiana. He was a member of the Bloomington Rotary Club, the Greater Bloomington Chamber of Commerce, and President of the Monroe County Family YMCA Board of Directors.

As Chair of the Appellate Practice Section of the Indiana State Bar Association, he initiated the Appellate Rules Project, which culminated in a complete revision of the Indiana Rules of Appellate Procedure. In 2001, he organized and co-chaired "Caught in the Middle: A National Symposium on the Role of State Intermediate Appellate Courts," attended by judges from twenty-two states, the first such national conference. He has served as a member of the Indiana Supreme Court Committee on Rules of Practice and Procedure (1995 to 2005) and the Indiana Supreme Court Judicial Technology and Automation Committee (1999 to 2005), and he represents the judiciary on the Indiana Department of Homeland Security Counter-Terrorism and Security Council.

Judge Najam is a member of the American, Indiana, and Monroe County Bar Associations, a graduate of the Indiana Graduate Program for Judges, a Fellow of the Indiana and Indianapolis Bar Foundations, a member of Phi Delta Phi legal fraternity, and an Eagle Scout.

The 15 members of the Indiana Court of Appeals issue some 2,500 written opinions each year.

The Court of Appeals hears cases only in three-judge panels. Panels rotate three times per year. Cases are randomly assigned.

TODAY'S PANEL OF JUDGES

Hon. L. Mark Bailey (Decatur County)

- Judge of the Court of Appeals since January 1998

L. Mark Bailey was raised in Decatur County on the family farm first homesteaded by his ancestors more than 150 years ago. He was appointed to the Indiana Court of Appeals by Governor Frank O'Bannon in January of 1998 and was retained on the Court by election in 2000.

Before his appointment, Judge Bailey was a trial court judge, an administrative law judge, and a practicing attorney. A husband and father, he earned his B.A. from the University of Indianapolis in 1978; his J.D. from Indiana University School of Law at Indianapolis in 1982; and his M.B.A. from Indiana Wesleyan University in 1999. He was elected judge of the Decatur County Court in 1991. From 1992 until his appointment to the Court of Appeals, he served as judge of the Decatur Superior Court.

During his legal career, Judge Bailey has served public interest and professional organizations in various capacities. He chaired the Local Coordinating Council of the Governor's Task Force for a Drug-Free Indiana and the Judicial Conference Alternative Dispute Resolution committee. He also served on the Board of Managers of the Indiana Judges Association and the Judicial Ethics Committee of the Indiana Judicial Center.

Judge Bailey is Past-Chair of the Indiana Pro Bono Commission, having been awarded the Indiana Bar Foundation's Pro Bono Publico Award and the 2002 Randall Shepard Award for his pro bono contributions. His writings include, "A New Generation for Pro Bono," published in the *Indiana Lawyer* in 2006. He is also a certified civil mediator and a Master in the Indianapolis American Inn of Court.

A strong supporter of law-related education, Judge Bailey is currently a member of the Judicial Education Committee of the Judicial Conference of Indiana. He is also an adjunct professor at the University of Indianapolis and, in February of 2006, served as the Distinguished Jurist in Residence at Stetson University College of Law. In 2004, Judge Bailey and his First District colleagues received the Indiana Bar Foundation Law-Related Education Award for their commitment to bringing oral arguments into community settings. Judge Bailey is also a frequent presenter at Indiana Continuing Legal Education seminars, and he regularly volunteers to judge law school trial advocacy and moot court competitions and to teach at National Institute of Trial Advocacy programs.

ATTORNEYS FOR THE PARTIES

For Appellant, Charles Saper:

**William J. Cohen
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Elkhart**

William J. Cohen was born on December 31, 1950, in Elkhart, Indiana. He was graduated from the University of Arizona in 1972 and was graduated from Indiana University School of Law/Indianapolis in 1977. He was admitted to the practice of law in Indiana in 1978 and in Michigan in 1979.

Mr. Cohen maintains a trial practice in Elkhart, Indiana, concentrating on personal injury, criminal defense, and appellate practice.

Mr. Cohen has presented oral arguments States Supreme Court, the 7th Circuit Court of Appeals, the before the United ndiana Supreme Court and the Indiana Court of Appeals.

For more information, please visit the Indiana Court of Appeals website at <http://www.in.gov/judiciary/appeals/>

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For Appellee, State of Indiana:

George P. Sherman
Deputy Attorney General
Indianapolis

A native of Muskegon, Michigan, **George P. Sherman** lost his father in a car accident when he was nine years old. He was raised by his mother in Fremont, Michigan and Zephyrhills, Florida. He received his Bachelor of Arts degree in Religion from Bob Jones University in Greenville, South Carolina in 1999 and his Doctor of Jurisprudence degree from Indiana University School of Law-Bloomington in 2002.

During law school, Mr. Sherman clerked at the Office of the Indiana Attorney General in the General Litigation and Appeals Divisions.

Following his graduation from law school, he had a postdoctoral fellowship at the law school with Fred Aman, who was then dean of IU School of Law-Bloomington.

Mr. Sherman was admitted to practice in Indiana and the U.S. District Courts for the Northern and Southern Districts of Indiana in 2002. In December of that year, he joined the Office of the Indiana Attorney General as a Deputy Attorney General in the Appeals Division. Mr. Sherman has argued before the Indiana Court of Appeals, the Indiana Supreme Court, and the United States Court of Appeals for the Seventh Circuit, including in *Salyers v. State*, 862 N.E.2d 650 (Ind. 2007); *Pinkston v. Madry*, 440 F.3d 879 (7th Cir. 2006); and *Smith v. State*, 829 N.E.2d 1021 (Ind. Ct. App. 2005).

AMICUS BRIEFS

A person who is not a party to a lawsuit may file a brief of amicus curiae, with permission of the Court, if he or she has a strong interest in the subject matter.

- There are no amicus briefs in this case.